STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
E. T. FITZGERALD, P.J., D.E. HOLBROOK, Jr., and G.R. McDONALD, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

Supreme Court
No. 118670

CARMAN A. HARDIMAN,

Defendant-Appellee.
_____/

Court of Appeals No. 213402
Circuit Court No. 97-150129-FH

BRIEF ON APPEAL—APPELLANT

ORAL ARGUMENT REQUESTED

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Defendant was charged with possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). Following pre-trial motions, Defendant's jury trial was held on May 28 and 29, 1998. (14a) The jury found Defendant guilty as charged. (154a-155a) Defendant appealed as of right to the Court of Appeals. MCR 7.203(A). (2a, 4a) The Court of Appeals reversed Defendant's convictions, finding insufficient evidence connecting Defendant to the drugs. (2a-3a) The People sought leave to appeal to this Court, maintaining that the Court of Appeals' decision is clearly erroneous and has caused a material injustice. MCR 7.302(B)(5). On November 14, 2001, this Court granted the People's application for leave to appeal. (1a)

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUSTAIN DEFENDANT'S CONVICTIONS OF POSSESSION WITH INTENT TO DELIVER LESS THAN 50 GRAMS OF HEROIN AND POSSESSION OF MARIJUANA?

The Court of Appeals answered this question, "No."

The People contend the answer to this question is, "Yes."

Defendant will contend the answer should be, "No."

II. WHETHER THE "NO INFERENCE UPON INFERENCE" RULE OF PEOPLE v ATLEY, 392 MICH 298 (1974), WAS VIOLATED UNDER THE FACTS OF THIS CASE?

The Court of Appeals did not address this issue. The parties were directed to brief this issue by the Supreme Court. (1a)

The People contend the answer to this question is, "No."

Defendant will contend the answer should be, "Yes."

III. WHETHER THE "NO INFERENCE UPON INFERENCE" TERMINOLOGY SHOULD BE ABANDONED AND THAT PART OF PEOPLE v ATLEY, 392 MICH 298 (1974), SHOULD BE OVERRULED?

The Court of Appeals did not address this issue. The parties were directed to brief this issue by the Supreme Court. (1a)

The People contend the answer to this question is, "Yes."

Defendant will contend the answer should be, "No."

STATEMENT OF FACTS

Defendant was charged with possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). The charges against Defendant, and co-defendant Rodney Crump, arose as a result of the execution of a search warrant at 278 Oakland Avenue, Apartment 2, in Pontiac, on October 22, 1996. A preliminary examination was conducted on January 2, 1997. At the conclusion of the examination, Defendant was bound over to circuit court for trial as charged. (8a-9a)

Defendant's jury trial was held on May 28 and 29, 1998, with the Honorable Robert W. Carr, (Visiting) Oakland County Circuit Judge, presiding.[1] The prosecution's theory was that Defendant and co-defendant Crump lived in the apartment, and that they jointly and constructively possessed the drugs found in the bedroom. (32a-39a, 121a-130a) The defense maintained that the circumstantial evidence did not sufficiently link Defendant to the drugs. (39a-46a, 131a-148a) The jury found Defendant guilty as charged. (154a-155a) The Court of Appeals reversed Defendant's convictions, finding insufficient evidence connecting Defendant to the drugs. (2a-3a) In reaching its decision, the Court of Appeals concluded "that the prosecution failed to establish the requisite nexus between defendant and the contraband beyond a reasonable doubt." (3a) The present case is now before this Court on leave granted. (1a)

Testimony at trial established that several Pontiac police officers assisted in the execution of a search warrant at 278 Oakland Avenue, Apartment 2, on October 22, 1996, at about 3:00 - 3:30 p.m. (47a-50a, 71a-75a, 105a-106a) The entry team went to the back door of the apartment

[1] Defendant's pre-trial motions to quash the information and to suppress evidence were denied in May and August 1997, respectively. (11a,12a)

building. (75a, 106a) Upon opening the back door, Officers Brian McLaughlin and Peter Mistretta saw some people in the hallway. (75a, 106a) A man nearest the door was secured, as was another man in the hallway who initially ran. A third man in the hallway got away. (75a-76a, 106a-107a, 109a) Sergeant Robert Ford was initially responsible for outside security. He encountered one subject and secured him.[2] (49a-51a) Then Officer McLaughlin and other officers gained entry into Apartment 2. (76a) There was nobody inside the apartment. (76a) Apparently, Defendant was in the rear parking lot. (110a) She was brought, along with the others who had been secured, including co-defendant Crump, to the living room of Apartment 2. (51a-52a, 91a- 93a, 111a) Sgt. Ford could not recall exactly how many individuals were in the living room, but approximated 3 to 5 people, both male and female. (52a)

After everyone was secured, the officers began their search of the apartment. (76a-77a) The premises were described as a 2-bedroom apartment, with a kitchen area, a dining room, a living room area, and bathroom. (51a) Sgt. Ford testified that he searched the dining room. (53a) In a garbage can, in the dining room, he found 8 plastic baggies, each with one corner end torn away. (53a-54a) Sgt. Ford explained that, in his experience as a narcotics officer, he had come across instances where baggies were used to package drugs such as marijuana, crack and powder cocaine, and heroin. (58a) Sgt. Ford explained that the drugs are placed in the corner of the baggie, that portion of the bag is twisted or tied off, and then the corner is cut or torn away. The remaining portion of the baggie is thrown away. (58a)

Sgt. Ford also, as well as Officer McLaughlin, searched the furnished northwest bedroom

[2] Sgt. Ford was able to determine that this person was not a resident of the target apartment, but lived at a nearby apartment building. (52a-53a)

of the apartment. (59a, 63a, 77a, 79a) The bedroom was described as containing a bed, a nightstand, a dresser, and a television on a stand. (63a, 79a) The bedroom appeared to Officer McLaughlin to be occupied. (79a) Correspondence from the Oakland County Department of Social Services, addressed to Defendant at 278 Oakland Avenue, Apartment 2, was found in the nightstand right next to the bed. (59a-62a) Also found in the nightstand were six ten-dollar packs of heroin secured in a corner tie, a ten-dollar bag of marijuana, $130.00 in cash, and an i.d. card and a payment book for Rodney Crump. (77a-78a, 96a) There was no correspondence to anyone other than Defendant and Crump found in the bedroom. (78a)

In the northwest bedroom closet, there was male and female clothing. (77a) Forty ten-dollar packs of heroin in a large baggie were found inside the pocket of a dress in the closet.[3] The heroin was packaged in four "bundles" -- packs of ten. Officer McLaughlin explained that heroin is commonly sold on the street as a bundle. (77a, 87a)

Also found in the bedroom were $400.00 in a sock in the dresser, and correspondence for Rodney Crump, as well as a phone calling card, on a TV stand. (77a, 97a) There was no paraphernalia associated with the use of drugs found in the bedroom. (86a)

There was a letter to Defendant addressed to 278 Oakland Avenue, Apartment 2, found in the locked mailbox for Apartment 2. (78a-79a, 90a) During the search, there was no correspondence found identified with anyone other than Defendant or co-defendant Crump.[4] (84a-85a)

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[3] Although the dress was not seized, a photograph of it was taken and admitted as an exhibit at trial. (82a-84a, 88a)

[4] The officers indicated that they did not attempt to obtain fingerprints from any of the evidence. (63a, 90a) Officer McLaughlin explained that fingerprinting was not necessary because they had known suspects and correspondence for the suspects at that residence. (90a, 92a-93a)

The parties stipulated that the toxicology report indicated the substances seized were heroin and marijuana, less than 55 grams. (83a) In Officer McLaughlin's opinion, based on all of the circumstances, including packaging, the heroin was possessed for delivery and not for personal use. (94a)

Defendant's motion for a directed verdict was denied. (114a-120a) Defendant chose not to testify and presented no witnesses.

As already indicated, the jury found Defendant guilty as charged. (154a-155a) Defendant was sentenced on July 1, 1998, to lifetime probation for her conviction of possession with intent to deliver less than 50 grams of heroin. (156a) Defendant was sentenced to one year probation for her conviction of possession of marijuana. (157a)

On February 6, 2001, the Court of Appeals reversed Defendant's convictions for lack of sufficient evidence. (2a-3a) The People sought leave to appeal to this Court the reversal of Defendant's convictions. In an Order dated November 14, 2001, this Court granted the People's application for leave to appeal. (1a) In the Order, the Court stated: "In addition to the issue raised by the application, the parties shall brief the issue of whether the inference upon inference rule of People v Atley, 392 Mich 298 (1974), was violated under the facts of this case, and whether that decision should be overruled." (1a)

SUMMARY OF ARGUMENT

In a per curiam Opinion issued February 6, 2001, the Court of Appeals reversed Defendant's convictions for possession with intent to deliver less than 50 grams of heroin and possession of marijuana. (2a-3a) The Court of Appeals determined there was insufficient evidence presented at trial that Defendant possessed the heroin and marijuana found inside the apartment in question. Although the Court of Appeals found there was sufficient evidence "linking Defendant to the apartment", the Court believed there was not sufficient evidence "adduced connecting Defendant to the drugs themselves." The Court of Appeals stated (at 3a):

> No direct evidence was presented establishing that defendant was a resident in the apartment or that she had knowledge of the drugs found. No fingerprint evidence was presented placing defendant in close proximity to the drugs, nor was it established that the blue denim dress [in which heroin was found] belonged to defendant.

The Court of Appeals therefore concluded "that the prosecution failed to establish the requisite nexus between defendant and the contraband beyond a reasonable doubt." (3a) On November 14, 2001, this Court granted the People's application for leave to appeal. (1a) The People submit that the Court of Appeals' decision reversing Defendant's convictions for lack of sufficient evidence is clearly erroneous. In this case, the circumstantial evidence and reasonable inferences arising from the evidence was sufficient to establish possession--when viewed in the light most favorable to the prosecution. The Court of Appeals, in arriving at the contrary conclusion, essentially re-weighed the evidence, but that is not the standard of review for a sufficiency of the evidence challenge. The People respectfully request that this Honorable Court reverse the Court of Appeals' decision and reinstate Defendant's convictions.

In addition to the issue raised in the People's application, this Court directed the parties to

brief "the issue of whether the inference upon inference rule of People v Atley, 392 Mich 298 (1974), was violated under the facts of this case and, whether that decision should be overruled." (1a) [The Atley opinion may be found in the Appendix at 19a-31a.] Even under the "no inference upon inference" rule, multiple inferences can be based on the same set of facts. The jury is not prevented from making more than one inference in reaching its decision. If each inference is independently supported, any number of inferences may be combined to decide the ultimate question. People v McWilson, 104 Mich App 550, 555 (1981), lv den 412 Mich 865 (1981). As illustrated below, the inference upon inference rule was not violated under the facts of this case. Further, the People submit that the "no inference upon inference" terminology, which has been often criticized, frequently qualified, and commonly repudiated by legal scholars and courts from many jurisdictions, should be abandoned and that part of People v Atley should be overruled. Instead, the approach followed in People v Orsie, 83 Mich App 42 (1978), lv den 408 Mich 857 (1980), and its progeny should be adopted. "There is nothing inherently wrong or erroneous in basing a valid inference upon a valid inference." Orsie, supra at 48.[5] As recognized by Wigmore, "the drawing of inference from inference is the natural and inevitable course of things." 1A Wigmore, Evidence (Tillers rev. 1983), §41, p 1112. The rule should be only that an inference cannot be based on an inference that is too remote, speculative or conjectural. As long as the first inference is a reasonably probable one there should be no prohibition against using it as a basis for a succeeding inference.

[5] In a dissenting opinion, R.M. Maher, J., disagreed that the no inference on inference rule should be abandoned. Orsie, supra at 54-56.

ARGUMENT

I. CONTRARY TO THE COURT OF APPEALS' CONCLUSION, SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUSTAIN DEFENDANT'S CONVICTIONS OF POSSESSION WITH INTENT TO DELIVER LESS THAN 50 GRAMS OF HEROIN AND POSSESSION OF MARIJUANA.

Standard of Review

> In reviewing the sufficiency of the evidence, [the] Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. People v Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).
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> People v Fetterley, 229 Mich App 511, 515 (1998), lv den 459 Mich 866 (1998).

In People v Nowack, 462 Mich 392, 400 (2000), this Court stated:

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." People v Carines, 460 Mich 750, 757; 597 NW2d 130 (1999).

Argument

Defendant claimed, and the Court of Appeals agreed, that there was insufficient evidence produced at trial to sustain her convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). (2a-3a) The People disagree with Defendant, and submit that the Court of Appeals' decision is clearly erroneous. The People submit that in reaching its conclusion, the Court of Appeals was re-weighing the evidence rather than viewing it in the light most favorable to the prosecution.

The elements that the prosecutor must prove to establish possession with intent to deliver less than 50 grams of heroin include that the defendant knowingly possessed the heroin with the intent to deliver. See People v Wolfe, 440 Mich 508, 516-517 (1992), amended 441 Mich 1201 (1992); People v Darryl Griffin, 235 Mich App 27, 34 (1999), lv den 461 Mich 919 (1999). Intent to deliver can be inferred from packaging, quantity, paraphernalia, and other surrounding circumstances. Wolfe, supra at 524; Wayne County Prosecutor v Recorder's Court Judge, 119 Mich App 159, 162 (1982); People v Ray, 191 Mich App 706, 708 (1991). For the crime of possession of marijuana, it must also be established that the defendant knowingly possessed the marijuana. See CJI2d 12.5.

The "trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence." People v Legg, 197 Mich App 131, 132 (1992), lv den 442 Mich 916 (1993). Circumstantial evidence is at least as satisfactory as direct evidence. Wolfe, supra at 525-526. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to establish possession. Wolfe, supra at 526; People v Sammons, 191 Mich App 351, 371 (1991), lv den 439 Mich 938 (1992). See also People v Jolly, 442 Mich 458, 466 (1993). The prosecution, in order for a jury to find a defendant guilty on the strength of circumstantial evidence, need only prove its own theory of the case beyond a reasonable doubt; every reasonable theory consistent with innocence need not be negated. Nowack, supra; People v Konrad, 449 Mich 263, 273 at n 6 (1995); People v Hopson, 178 Mich App 406, 409 (1989).

Possession may be actual or constructive. Wolfe, supra at 520. Possession need not be exclusive and may be **joint**, with more than one person actually or constructively possessing a controlled substance. Konrad, supra at 271; Wolfe, supra at 520. A person constructively

possesses a controlled substance where she has the right to exercise control over it and knowledge that it is present, or if there is proximity to the substance together with indicia of control. Wolfe, supra at 520; People v Hill, 433 Mich 464, 470 (1989); Sammons, supra at 371. It is true that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Wolfe, supra at 520. However, "[t]he rule that mere presence is not enough to conclude that a defendant is guilty does not mean that a jury may not draw any inference regarding possession or intent to deliver from the defendant's presence in compromising circumstances." Wolfe, supra at 535-536 (Boyle, J., concurring in part and dissenting in part). Constructive possession exists when the **totality** of the circumstances indicates a sufficient nexus between the defendant and the contraband. Wolfe, supra at 521. Contrary to the Court of Appeals' conclusion, there were several factors that linked Defendant to the heroin and marijuana found in the bedroom and established her knowledge of its presence.

The evidence when viewed in a light most favorable to the prosecution established that Defendant and co-defendant Crump lived at the apartment in question and shared the northwest bedroom where the drugs were found—and that Defendant thus had the right to exercise control over the items in the apartment and northwest bedroom.[6] The bedroom was appropriately furnished. (63a, 79a) The officers searching the northwest bedroom referred to only one nightstand being in that bedroom. (59a, 61a, 63a, 77a, 79a) In the nightstand, right next to the bed, correspondence was found from the Oakland County Department of Social Services,

[6] See for example, People v Johnson, 68 Mich App 697, 700-701 (1976). Although the Court found insufficient evidence of an intent to deliver, it acknowledged that, if joint ownership of a house trailer is established, "it is possible to infer that such joint ownership could lead to an inference of joint ownership of the contents of the house trailer."

addressed to Defendant at 278 Oakland Avenue, Apartment 2. (59a-62a) There was no correspondence to anyone other than Defendant and co-defendant found in the bedroom. (78a) There was a letter to Defendant addressed to 278 Oakland Avenue, Apartment 2, found in the mailbox for Apartment 2. (78a-79a) During the search, there was no correspondence found identified with anyone other than Defendant or co-defendant Crump. (84a-85a) It can reasonably be inferred from the letter to Defendant in the mailbox, that she was residing at that apartment at the time the drugs were found. It can also be inferred from the letter in the nightstand, right next to the bed, along with the presence of male and female clothing in the bedroom closet (77a), that Defendant shared the bedroom in which the drugs were found. The correspondence found with Defendant's name and the address of the apartment in question does establish Defendant lived there. Further, Defendant was apparently in the rear parking lot of the apartment building when detained by police. (110a)

The evidence and reasonable inferences, when viewed in a light most favorable to the prosecution, further established Defendant's knowledge of the presence of the drugs. In addition to correspondence to Defendant and documents for co-defendant, there were six ten-dollar packs of heroin secured in a corner tie, a ten-dollar bag of marijuana, and $130.00 in cash in the bedroom nightstand -- right next to the bed. (77a-78a) In the bedroom closet, forty ten-dollar packs of heroin in a large baggie were found inside the pocket of a dress. (77a) Defendant was the only female for which correspondence was found for that address. (78a, 84a-85a)

The evidence was sufficient to establish Defendant's joint and constructive possession of the heroin and marijuana. And the amount of heroin and its packaging (77a, 87a), along with the discarded baggies with one corner cut off and the lack of use paraphernalia (53a-54a, 58a, 86a), established the intent to deliver.

The situation in this case is not similar to cases previously cited by Defendant. In People v Harris, 358 Mich 646, 647 (1960), a sack containing marijuana was found by police in an apartment. The evidence disclosed that defendant Harris did not live in the apartment. "The only evidence that could possibly justify a finding of guilt was a fingerprint upon the sack containing marijuana cigarettes, which fingerprint was identified as that of defendant." The Court found this evidence insufficient to sustain a conviction of possession. In the present case, Defendant was in the apartment parking lot at the time the warrant was executed, mail addressed to her was in the apartment mailbox, and mail addressed to her was in the bedroom nightstand where drugs were found. The bedroom was furnished, had male and female clothing in the closet, and appeared occupied. Unlike Harris, there were several factors establishing a connection between Defendant and the residence and the drugs—from which knowledge and control could be inferred. Cf. also People v Simpson, 104 Mich App 731 (1980), where the Court found insufficient evidence connecting the defendant to the heroin in a backroom of the house in which she lived.[7] The instant case is also not similar to People v Lewis, 178 Mich App 464 (1989), lv den 435 Mich 864 (1990). In Lewis, supra at 466-469, the defendant was outside of a house when approached by an undercover officer looking to buy cocaine. The defendant, using a key, went inside the house and returned with the cocaine. Later, the police raided the house and arrested defendant Lewis, who was on the sidewalk. The officer found cocaine on the dining room table. The defendant's delivery conviction was upheld, but his conviction for

[7] Unlike Simpson, supra at 733, here correspondence addressed to Defendant was found in the same bedroom nightstand as the heroin and marijuana. And, heroin was in the pocket of a dress, in the bedroom closet, in the apartment where Defendant was the only female for which correspondence addressed to her was found—in the mailbox and nightstand.

possession with intent to deliver cocaine was reversed due to insufficient evidence. The Court found "no direct evidence connecting defendant to the cocaine found inside the house," i.e., defendant was outside, there were no fingerprints on the bags, and there was no direct testimony the cocaine belonged to defendant. Lewis, supra at 468. The Court also concluded the circumstantial evidence was insufficient, finding the most that could be said about the evidence was that "it shows that defendant had access to the inside of the house from which he and possibly others sold cocaine." Lewis, supra at 469. The Lewis Court stated:

> The evidence shows that defendant was not the only person who had access to the inside of the house. A defense witness testified that defendant did not live there. Defendant was arrested outside the house, a different man was arrested inside. Anyone could have been inside the house during the short time that transpired between the sale to Watkins and the raid and placed the cocaine on the dining room table.
>
> Lewis, supra at 469.

In contrast, the evidence here and reasonable inferences show Defendant had more than just access to the inside of the apartment. As already indicated, there was correspondence addressed to Defendant in the apartment mailbox and in the bedroom nightstand. Defendant was the only female for which correspondence was found. And, the heroin in the dress pocket found in the bedroom closet and the drugs in the bedroom nightstand are not as ambiguous as finding cocaine on a dining room table. Although Defendant may offer an alternative scenario for the drugs being in the apartment—the prosecution does not have to negate every reasonable theory consistent with innocence. Konrad, supra.

Contrary to Defendant's previous position, this case is similar to People v Richardson, 139 Mich App 622 (1984). In Richardson, supra at 625, cocaine was found in a drawer of a waterbed along with several papers with defendant's name on them. The Court indicated that

"[a]lthough there was evidence that several persons had access to the bedroom, we believe that the presence of defendant's papers in the drawer supports a reasonable inference that defendant exercised control over the contents of the drawer and knew that the cocaine was present." Richardson, supra at 625-626. Here, in the nightstand, right next to the bed, correspondence was found addressed to Defendant at that address. (59a-62a) Also in the nightstand, there were six ten-dollar packs of heroin and a ten-dollar bag of marijuana. (77a-78a) The officers searching that bedroom described it as being occupied and containing only one nightstand. (59a, 61a, 63a, 77a, 79a) There was also mail addressed to Defendant at that address found in the locked mailbox. (78a-79a) Similar to Richardson, the evidence here supports a reasonable inference that Defendant exercised (joint) control over the contents of the nightstand and knew the heroin and marijuana were present. Again, the prosecution does not have to disprove all theories consistent with Defendant's innocence. It is sufficient that the prosecution prove its own theory beyond a reasonable doubt. Richardson, supra at 626; Konrad, supra. As in Wolfe, supra at 523-524, this Court should find that it cannot agree with the Court of Appeals that the prosecution failed to establish the requisite nexus between Defendant and the contraband. (3a)

Reversal of Defendant's convictions is not warranted. The Court of Appeals' decision should be reversed.

II. THE "NO INFERENCE UPON INFERENCE" RULE OF PEOPLE v ATLEY, 392 MICH 298 (1974), WAS NOT VIOLATED UNDER THE FACTS OF THIS CASE.

Standard of Review

The application of the law to the facts is reviewed de novo. People v Barrera, 451 Mich 261, 269 at n 7 (1996), cert den 519 US 945; 117 S Ct 333; 136 L Ed 2d 246 (1996); People v Aldrich, 246 Mich App 101, 116 (2001).

Argument

Defendant was charged with possession with intent to deliver heroin and possession of marijuana. MCL 333.7401(2)(a)(iv); MCL 333.7403(2)(d). For both offenses, the prosecutor must prove Defendant knowingly possessed the heroin and marijuana. See People v Wolfe, 440 Mich 508, 516-517 (1992), amended 441 Mich 1201 (1992); CJI2d 12.5. Possession may be joint. And, possession may be constructive—where Defendant has the right to exercise control over the drugs and knowledge that they are present. Wolfe, supra at 520. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to establish possession. Wolfe, supra at 526. Even under the "no inference upon inference" rule of People v Atley, 392 Mich 298, 314-316 (1974), multiple inferences can be based on the same set of facts.

> Whatever is meant by the phrase "inference upon inference", the law in Michigan is that guilt may not be based upon such a foundation. However, the factfinder is not prevented from making more than one inference in reaching its decision. That is, if each inference is independently supported by established fact, any number of inferences may be combined to decide the ultimate question.
>
> People v McWilson, 104 Mich App 550, 555 (1980), lv den 412 Mich 865 (1981).

The "no inference upon inference" rule was not violated under the facts of this case.

Fact: The northwest bedroom at 278 Oakland Avenue, Apartment 2, was appropriately furnished; it

contained a bed, nightstand, dresser, and television. (63a, 79a)

Fact: The northwest bedroom closet had clothes in it. (77a)

Inference: The bedroom was currently occupied.

Fact: Defendant was in the apartment parking lot at the time of the search warrant execution. (110a)

Fact: A letter to Defendant addressed to 278 Oakland Avenue, Apartment 2, was in the locked mailbox for Apartment 2. (78a-79a, 90a)

Fact: Correspondence addressed to Defendant at 278 Oakland Avenue, Apartment 2, was found in the nightstand right next to the bed in the northwest bedroom. (59a-62a)

Fact: There was no correspondence to, or documents identified with, anyone other than Defendant and co-defendant Crump found in the bedroom. (78a)

Fact: There was no correspondence identified with anyone other than Defendant or co-defendant Crump found in the apartment. (84a-85a)

Fact: There was male and female clothing in the northwest bedroom closet. (77a)

Inference: Both Defendant and co-defendant shared the apartment and the northwest bedroom at the time the drugs were found.

Defendant's argument that from this conclusion the jury must further infer Defendant had control over the items in the bedroom, i.e., dress in closet, is without merit. "The two conclusions are one in the same." See McWilson, supra at 557.

Fact: In addition to correspondence addressed to Defendant in the northwest bedroom nightstand positioned right next to the bed, there were six ten-dollar packs of heroin secured in a corner tie, a ten-dollar bag of marijuana, and $130 in cash. (77a-78a)

Fact: There were forty ten-dollar packs of heroin in the pocket of a dress in the northwest bedroom closet. (77a)

Fact: Defendant was the only female for which correspondence was found for that address. (78a, 84a-85a)

Inference: Defendant had knowledge of the presence of the heroin and marijuana.

Conclusion: The jury could draw independent inferences from the facts of this case. The jury could properly infer Defendant's guilt from the established facts without violating the "no inference upon inference" rule.

III. THE "NO INFERENCE UPON INFERENCE" TERMINOLOGY, WHICH HAS BEEN CRITICIZED, QUALIFIED, AND REPUDIATED BY LEGAL SCHOLARS AND COURTS FROM MANY JURISDICTIONS, SHOULD BE ABANDONED AND THAT PART OF PEOPLE v ATLEY, 392 MICH 298 (1974), SHOULD BE OVERRULED. INSTEAD, THE APPROACH FOLLOWED IN PEOPLE v ORSIE, 83 MICH APP 42 (1978), AND ITS PROGENY CONCERNING CIRCUMSTANTIAL EVIDENCE AND REASONABLE INFERENCES SHOULD BE ADOPTED.

Standard of Review

Questions of law are reviewed de novo. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80 (1991).

Argument

> "It was once suggested that an inference upon an inference will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, and this suggestion has been repeated by several courts and sometimes actually has been enforced." 1A Wigmore, Evidence (Tillers rev. 1983), §41, p 1106 (footnotes omitted).

In People v Atley, 392 Mich 298, 314-316 (1974), this Court applied the "no inference upon an inference" rule "as an alternative ground for reversing that defendant's conviction of conspiracy to sell marijuana." People v Young, 114 Mich App 61, 63 (1982). However, the "no inference upon an inference" rule has been called into question and/or modified or qualified by several panels of the Court of Appeals.[8] And this rule "has been severely criticized and generally

[8] See People v Orsie, 83 Mich App 42, 46-48 (1978), lv den 408 Mich 857 (1980); People v Fisher, 193 Mich App 284, 289 (1992), lv den 440 Mich 909 (1992); People v Sutherlin, 116 Mich App 494, 501-502 (1982); Young, supra at 63-64; People v Boose, 109 Mich App 455, 471 (1981); People v Williams, 94 Mich App 406, 414-417 (1979); People v Horowitz, 37 Mich App 151, 154-155 (1971), lv den 387 Mich 753 (1972); People v Belcher, 29 Mich App 341, 344-345 (1971), lv den 384 Mich 821 (1971); People v Helcher, 14 Mich App 386, 390-391 (1968). See also People v Nowack, 462 Mich 392, 403 at n 2 (2000) [citing People v Horowitz, supra at 155 and quoting Dirring v United States, 328 F2d 512, 515 (CA 1, 1964)].

discredited by legal scholars and by a number of courts" from many jurisdictions.[9] Young, supra at 63-64. Moreover, the bases from which the Atley Court extracted the "no inference upon inference" doctrine are questionable. The Atley Court did not have to get to a discussion of the "no inference upon inference" doctrine to reach its conclusion, the cases upon which Atley premised its acceptance of the "no inference upon inference" rule have been tortured into that confusing and misleading abridgment, and there are now many Court of Appeals' panels that do not follow the literal no inference on inference approach. Atley, supra at 314-317 and n 2. The "no inference upon inference" rule in Atley, supra, should now be overruled.

As the Atley Court itself made clear, its discussion of the "no inference on inference" rule was merely a secondary basis for reversal. Atley, supra at 314-315. As such, that discussion can be characterized as dicta and is not binding under the principle of stare decisis. People v Borchard-Ruhland, 460 Mich 278, 286 at n 4 (1999); Hett v Duffy, 346 Mich 456, 461 (1956).

The rationale behind the "no inference upon inference" rule has been explained as follows:

> The rule that one inference cannot be based on another inference and that one presumption cannot be based on another presumption is based on a recognition that when human beings are called upon to draw conclusions from proved facts they may err or speculate, or do both. And the chance of error or speculation increases in proportion to the width of the gap between underlying

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[9] See 1A Wigmore, Evidence (Tillers rev. 1983), §41, pp 1111, 1120-1132 at n 4. And see People v VanderVliet, 444 Mich 52, 61 (1993) [quoting Imwinkelreid, Uncharged Misconduct Evidence, §2:17, pp 45-46]:

> At one time, several American jurisdictions adhered to the view that an inference cannot be based upon another inference...Modernly, the courts have discredited the "no inference on an inference" rule.

See also 5 ALR3d 100, §3(c), pp 114-120 (exceptions, limitations and qualifications of the rule), and §4, pp 120-131 (rejection of rule).

> fact and ultimate conclusion where the gap is bridged by a succession of inferences, each based upon the preceding one.
>
> It is too much to say, however, that an inference is necessarily invalid or impermissible because it is based on a fact established in whole or in part by a preceding inference...
>
> United States v Shahane, 517 F2d 1173, 1178 (CA 8, 1975), cert den 423 US 893; 96 S Ct 191; 46 L Ed 2d 124 (1975).

Wigmore states the following about the "no inference upon inference" rule:

> There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted...In... innumerable daily instances we build up inference upon inference, and yet no court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon. 1A Wigmore, Evidence (Tillers rev. 1983), §41, p 1111 (footnote omitted).

This is how Atley should be viewed—strictly limited to its own facts.

As already indicated, the Atley Court applied the rule as an alternative ground for reversing the defendant's conspiracy conviction. The Court had already concluded the evidence was insufficient because there was a gap in the proof establishing a conspiracy to sell marijuana because the inference needed was not "a fair inference," and "on this record a matter of conjecture." Atley, supra at 312-314. In so finding, the Court cited to People v Beller, 294 Mich 464, 469 (1940) and to People v Sobczak, 344 Mich 465 (1955). The Beller Court, 469, in noting that a conspiracy may, and generally is, established by circumstantial evidence, stated:

> But the circumstances must be within safe bounds of relevancy and be such as to warrant a fair inference of the ultimate facts.

Accord Sobczak, supra at 469 ("But the circumstances must be such as to warrant a fair inference of the facts to be established.) This simple principle was, and still is, enough to resolve

sufficiency of evidence challenges. For example see People v Petrella, 424 Mich 221, 275 (1985)(where inference unsupported by the evidence of record; Court stated, "While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only upon assumption."); People v Fisher, 193 Mich App 284, 289 (1992), lv den 440 Mich 909 (1992)(where the evidence did not rise above the level of conjecture; Court, citing Orsie, supra, stated, "Inferences, however, may not be based on evidence that is uncertain or speculative or that raises merely a conjecture or possibility."). And, when scrutinized, cases that have followed Atley to find insufficient evidence did so simply and plainly because the inferences that had to be made were too remote and speculative.[10]

The Atley Court cited People v Petro, 342 Mich 299, 307-308 (1955), as its main reason for following the "no inference on inference" rule: "Inferences may be drawn from established facts; but inference may not be built upon inference." Atley, supra at 315 and n 2. As the Atley Court noted, however, the "Petro rule" was from the language of one opinion of a 3-3-2 Court split. "Nonetheless," the Court followed the "Petro rule"

> because "no inference upon inference" is strongly imbedded in the civil law of Michigan and it is therefore *a fortiori* applicable to criminal law which requires a stronger standard of proof. See Ginsberg v Burroughs Adding Machine Co, 204 Mich 130, 137; 170 NW 15 (1918); Glenn v McDonald Dairy Co, 270 Mich 346, 350; 259 NW 288 (1935); Ash v Great Lakes Greyhound Lines, 337 Mich 362, 369; 60 NW2d 166 (1953); Kroon v Kalamazoo County Road Commission, 339 Mich 1, 6-7; 62 NW2d 641 (1954).
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> Atley, supra at 315 at n 2.

[10] See for example People v Gordon, 60 Mich App 412 (1975); People v Johnson, 68 Mich App 697 (1976); People v Nickerson, 96 Mich App 604 (1980); People v Blume, 443 Mich 476 (1993). Also consider People v Petro, supra.

Petro premised its conclusion, that the Court had "consistently held that presumptions or inferences cannot rest upon other presumptions or inferences," on a passage taken from Ginsberg v Burroughs Adding Machine Co, 204 Mich 130, 137 (1918). Petro, supra at 307-308. The Ginsberg Court was addressing a civil matter involving the review of the industrial accident board and a claim for compensation. The passage from Ginsberg quoted in Petro must be read in this context and in full:

> The burden of establishing a claim for compensation rests on those seeking the award. They are not required to establish their case by positive, direct evidence; in many cases that would be impossible; they may prove their case by circumstantial evidence as other cases are established. The board is the trier of facts, and measures the conflicting testimony, medical as well as lay. (Citations omitted.) It is the province of the board to draw the legitimate inferences from the established facts and to weigh the probabilities from such established facts. But the inferences drawn must be from established facts; inference may not be built upon inference, possibilities upon possibilities, or inferences drawn contrary to the established facts, contrary to the undisputed evidence. If an inference favorable to the applicant can only be arrived at by conjecture or speculation the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail. McCoy v Michigan Screw Co., 180 Mich. 454; Draper v Regents of University, 195 Mich. 449; Albaugh-Dover Co. v Industrial Board, 278 Ill. 179 (115 N.E. 834), Curran v Newark Gear Co., 37 N.J.L.J. 21; Savoy Hotel Co. v Industrial Board, 279 Ill. 329 (116 N.E. 712); Sanderson's Case, 224 Mass. 558 (113 N.E. 355); Carroll v Knickerbocker Ice Co., [218 N.Y. 435 (113 N.E. 507)]; Burwash v F.Leyland & Co., 5 B.W.C.C. 663.
>
> Ginsberg, supra at 137.

In McCoy v Michigan Screw Co., 180 Mich 454, 458-459 (1914), cited by Ginsberg, supra, (another appeal from the industrial accident board), the Court stated:

> The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose "out of and in the course of his employment" rests upon the claimant.

(Citations omitted) Ruegg on Employers' Liability and Workmen's Compensation, p. 343, says:

"If an inference favorable to the applicant can only be arrived at by a guess the applicant fails. The same thing happens where two or more inferences equally consistent with the facts arise from them."

Boyd on Workmen's Compensation, § 559, says:

"The workman carries the burden of proving that his injury was caused by the accident and where he fails to do so, and where the evidence as to the cause of the injury is equally consistent with an accident, and with no accident, compensation may not be awarded him."

The Draper case cited in Ginsberg, supra, quoted McCoy, supra, and also quoted the following:

"In Ayr Steam Shipping Co., Ltd., v Lendrum, 6 B.W.C.C. 326, involving a fatal accident attended with uncertainty as to details, the court said:

" 'I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be direct, but may be by circumstantial evidence, but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbiter cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them'..."

Draper v Regents of University, 195 Mich 449, 455 (1917).

In Albaugh-Dover Co. v Industrial Board, 278 Ill 179; 115 NE 834, 835 (1971), also cited by Ginsberg, supra at 137, the Court stated:

The burden of proving the essential facts to establish the claim that there was an injury and that it arose out of the workman's employment rested upon the claimant. (Citation omitted.) The claimant must show, by direct or circumstantial evidence, an accidental injury arising out of and in the course of the employment, and a finding under the Workmen's Compensation act cannot rest on mere guess, conjecture, or possibility. On a review of the finding of the Industrial Board the court does not pass on the weight of the evidence as to controverted facts, but it is essential that there should be competent evidence fairly tending to prove the occurrence of an injury and that it arose out of the

> employment. Leaving out the verdict of the coroner's jury there was no evidence before the Industrial board tending in any degree to connect the diseased condition of Hausknecht or his subsequent death with the alleged injury on January 5, 1915, and the finding of the board being based on nothing more than surmise or possibility, it cannot be sustained.

In Savoy Hotel Co., v Industrial Board, 279 Ill 329; 116 NE 712, 714 (1917), again cited by Ginsberg, the Court stated:

> Not only does the burden rest upon the claimant to show that the injury arose out of and in the course of his employment, but he must show this by direct and positive evidence or by evidence from which such inference can be fairly drawn. The proof must be based upon something more than a mere guess, conjecture or surmise. (Citations omitted.) In this case there is no direct proof as to how Warlich came to his death. He had apparently finished his work for the day. He had been directed to do nothing further after he had finished cleaning the wash-room, and his fellow-employees and the clerk supposed that he had gone home, as was his custom. The finding that he was killed while in the course of his employment can be supported only by the merest guess and conjecture...

And, in Sanderson's Case, 224 Mass 558; 113 NE 355, 356-357 (1916), cited by Ginsberg, the Court stated:

> The Industrial Accident Board in the determination of questions of fact is permitted to draw such inferences from the evidence and all the circumstances as a reasonable man could draw, but its findings cannot properly be based merely upon conjecture or speculation. (Citations omitted.)
>
> The burden of proof rests upon the dependent to prove the facts necessary to establish a right to compensation under the act. As was said in *Sponatski's Case*, *supra*:
>
> 'The dependent must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. They can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess or speculation, than can a plaintiff in the ordinary action of tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim, before the dependents can succeed.'

Each of these cases cited in Ginsberg focuses only on inferences being fairly drawn and based upon more than guess, conjecture, speculation, or surmise. Once the Ginsberg language is accordingly considered, it is difficult to justify the abbreviated and severe "Petro rule" relied upon by Atley. Petro, Atley and the cases that follow their literal approach have tortured Ginsberg into a misleading doctrine.

Also, upon considering the Ginsberg language in full and in context, it is easy to understand the explanation concerning inferences in People v Belcher, 29 Mich App 341, 344-345 (1971), lv den 384 Mich 821 (1971), and the approach taken in such cases as People v Orsie, 83 Mich App 42, 46-48 (1978), lv den 408 Mich 857 (1980), People v Young, 114 Mich App 61, 63-64 (1982), and People v Sutherlin, 116 Mich App 494, 501-502 (1982). In Belcher, supra at 344-345, the Court explained:

> It must be remembered, however, that an important distinction exists between the pyramiding of inferences condemned in Petro, supra, and the legitimate use of circumstantial evidence. The former amounts to little more than prohibiting inferences based upon evidence which is itself speculative or uncertain. People v Helcher (1968), 14 Mich App 386. The latter, however, involves proof of a series of *facts*, which when viewed together form a chain of evidence showing a certain result...
>
> * * *
>
> We believe that the following statement by the United States Court of Appeals for the First Circuit adequately articulated the point:
>
> "The defendant cautions us against 'piling inference upon inference.' As interpreted by the defendant this means that a conviction could rarely be justified by circumstantial evidence. The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. If enough pieces of a jigsaw puzzle fit together, the subject may be identified even though some pieces are lacking.

> Reviewing the evidence in this case as a whole, we think the jury was warranted in finding beyond a reasonable doubt the picture of defendant Dirring." Dirring v United States, (CA1, 1964), 328 F2d 512, 515, cert den (1964), 377 US 1003 (84 S Ct 1939, 12 L Ed 2d 1052), reh den (1964), 379 US 874 (85 S Ct 27, 13 L Ed 2d 83). (Citations omitted.)
>
> See also, People v Helcher, supra.
>
> Without going into detailed analysis of each of the points defendant alleges to be an inference based upon an inference, suffice it to say that we believe inferences necessary to the prosecution's case were permissible and not based upon speculation or conjecture... (Emphasis original.)

In Orsie, supra at 46, the defendant claimed, among other things "that the circumstantial evidence used to convict him constituted piling inference on inference based on the same evidence." Defendant Orsie cited Atley in support of his position. The Orsie Court, 46, responded by stating: "In Atley, supra, the Court continues to pay lip service to the now generally discredited 'no inference upon an inference' terminology." The Orsie Court based its conclusion that this doctrine was held in "ill repute" on Wigmore (as quoted above at pages 17 and 19), and on 5 ALR3d 104-105, cited with approval in People v Eaves, 4 Mich App 457, 461 (1966), lv den 379 Mich 756 (1967). The Orsie Court, 47-48, explained:

> The underlying theory of the cases that use the no inference on an inference terminology is well and accurately stated in People v Helcher, [14 Mich App 386, 390; 165 NW2d 669 (1968),] which cites an often quoted Indiana case as follows:
>
> " 'What is actually meant by the statement found in many cases, that an inference cannot be based upon an inference, is that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility.' Shutt v State (1954), 233 Ind 169 (117 NE2d 892, 894), quoted approvingly in People v Eaves, (1966), 4 Mich App 457." (Footnote omitted.)
>
> Similarly, while we exercise the caution suggested in the Atley footnote, [392 Mich 298, 315-316, n 2,] we find the statement in

> the Federal case of Dirring v United States [, 328 F2d 512, 515 (CA 1, 1964), cert den, 377 US 1003; 84 S Ct 1939; 12 L Ed 2d 1052 (1964), reh den, 379 US 874; 85 S Ct 27; 13 L Ed 2d 83 (1964)] clear and instructive...

Then, after quoting the same passage from Dirring, as quoted in Belcher, supra, (see above at pages 24-25), the Orsie Court, 48, concluded:

> In short, we express a preference for abandoning the no inference upon inference terminology because we believe it to be misleading and uncertain of meaning. There is nothing inherently wrong or erroneous in basing a valid inference upon a valid inference. In so indicating, we do not consider that we are acting contrary to precedents established by the Supreme Court which are, of course, binding; on the contrary, we are consistent with the substance of those decisions.

In Young, supra at 63-64, the Court addressed Atley, as follows:

> ...the "no inference upon an inference" rule which was applied by the Supreme Court in People v Atley, 392 Mich 298; 220 NW 2d 465 (1974), [was] as an alternative ground for reversing that defendant's conviction of conspiracy to sell marijuana. In Atley, however, the Supreme Court acknowledged that the "no inference upon an inference" doctrine is a difficult concept at best." Id., 315. Moreover, the doctrine has been severely criticized and generally discredited by legal scholars and by a number of courts which have given the matter extensive consideration. See People v Orsie, 83 Mich App 42, 46-48; 268 NW 2d 278 (1978).
>
> The essential determination which must be made by the trier of fact in a case in which the conviction is based upon circumstantial evidence is more accurately stated in the rule enunciated in Dirring v United States, 328 F2d 512, 515 (CA 1, 1964), cert den 377 US 1003; 84 S Ct 1939; 12 L Ed 2d 1052 (1964), reh den 379 US 874; 85 S Ct 27; 13 L Ed 2d 83 (1964):
>
> > "The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends on another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt." (Footnote omitted.)

> We must determine, therefore, if there was sufficient circumstantial evidence presented at the trial in this case to warrant the trier of fact in concluding, beyond a reasonable doubt, that the defendant [aided and abetted in the commission of armed robbery].

The Young Court addressed the caution expressed by the Atley Court in using the language from Dirring, supra, as follows:

> In People v Atley, 392 Mich 298, 315, fn 2; 220 NW2d 465 (1974), the Supreme Court advised that the language in the paragraph from Derring [sic] from which this rule was taken should be used with caution. The Court went on to specify those sentences in the paragraph which it thought may be misapplied. The rule quoted here, however, was not included in those cautionary remarks.
>
> Young, 64 at n 1.

See also Sutherlin, supra at 501, following the Orsie approach.

In light of the precarious footing upon which Atley was based[11], the principles expressed in the cases rejected by Atley, supra at 315-316, n 2, namely People v Helcher, 14 Mich App 386 (1968) and People v Horowitz, 37 Mich App 151 (1971), lv den 387 Mich 753 (1972), and set out in Orsie and Sutherlin, are the better reasoned approach.

> What is actually meant...is that an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility.
>
> The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends on another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a

[11] The Atley Court also based its adoption of the "Petro rule" on the fact that it had been cited as authority by a number of Court of Appeals panels. 392 Mich at 315, n 2. And the Atley Court's third basis for adopting the "Petro rule" was because the "no inference upon an inference" rule "is recognized as established Michigan criminal law by Michigan's leading criminal law and procedure hornbook. See 1 Gillespie, Michigan Criminal Law & Procedure (Supp 1974), §388, p 220." Atley, supra, 315 at n 2.

> jury to conclude that defendant is guilty beyond a reasonable doubt.

Further, at one time, circumstantial evidence was distrusted. And there was a disagreement about whether it was "necessary that the prosecution disprove every reasonable hypothesis consistent with defendant's innocence." People v Williams, 94 Mich App 406, 414-416 (1979) and cases cited therein. In Williams, 414-415, the Court noted:

> Those panels expressing adherence to the rule that the prosecution must negate every reasonable hypothesis consistent with defendant's innocence when the evidence is entirely circumstantial have usually set aside convictions that were based upon an inference drawn from a prior inference originally drawn from the evidence. (Citations omitted.)
>
> Those panels not requiring the prosecutor to disprove every reasonable hypothesis consistent with defendant's innocence have subscribed to the view that circumstantial evidence is not less trustworthy and probative of guilt than direct evidence, and that the totality of the circumstances should be looked at in reviewing the evidence. The probative value of the circumstantial evidence is to be determined by the trier of fact. This line of cases allows logical inferences to support a conviction where the antecedent inference, drawn from the evidence introduced, is fair and reasonable and is not based on evidence that is uncertain, speculative, or raises merely a conjecture or possibility. (Citations omitted.)

In trying to resolve this disagreement, the Williams Court, 416, made this particularly fitting observation:

> It is submitted that a general distrust of circumstantial evidence is not justified, and that, when courts engage in discussions of "direct" and "circumstantial" evidence and the permissible inferences to be drawn therefrom, the courts are really concerned with how compelling the inference is. If inferences drawn from circumstantial evidence are so compelling that the trier of fact has no reasonable doubt of defendant's guilt, that should be sufficient basis for a guilty verdict. If circumstantial evidence does not give rise to inferences of such a compelling nature as to overcome the reasonable doubt standard, then a guilty verdict could not be justified, not because the evidence was circumstantial or because

> of basing inferences on inferences, but rather, because of the prosecution's failure to meet its burden of proof...

It is now well recognized that circumstantial evidence is at least as satisfactory as direct evidence and "circumstantial evidence is often times stronger and more satisfactory than direct evidence." Wolfe, supra at 525-526 (citation omitted). And it has been resolved that "[e]ven in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." People v Konrad, 449 Mich 263, 273 at n 6 (1995); People v Nowack, 462 Mich 392, 400 (2000). In line with the observations in Williams, supra, it is now time for this Court to overrule that part of Atley concerning the "no inference upon inference" rule.[12]

Abandoning the literal "no inference on inference" rule of Atley will not mean "defendant loses the protection of his right to be proved guilty of each element of the crime beyond a reasonable doubt." Orsie, 83 supra at 56 (Maher, J., dissenting). "Chains of inference are a familiar, widely accepted ingredient of any process of ratiocination. The method of reasoning, commonly called logic, is regularly relied upon in the realm of human endeavor, and should not be forbidden to a criminal jury." United States v Spinney, 65 F3d 231, 238 (CA 1, 1995).

[12] See also Lohse v Faultner, 176 Ariz 253, 259; 860 P2d 1306, 1312 (1992) (where the Court examined its jurisdiction's basis for the "no inference upon inference" rule, found it was based on the assumption that circumstantial evidence was intrinsically weaker than testimonial evidence, recognized that it is now well-settled that direct and circumstantial evidence have equal probative worth, noted that its state had abandoned the rule that each link in a chain of circumstantial inference must exclude every other reasonable hypothesis, and concluded that the inference upon inference rule had no further validity in that state).

> The appellate function, properly understood, requires the reviewing court to take a hard look at the record and to reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative. (Citations omitted.) This function is especially important in criminal cases, given the prosecution's obligation to prove every element of an offense beyond a reasonable doubt. Spinney, 234.

In the end, the whole point of a fair trial is to prevent verdicts based on speculation and conjecture. As long as the evidence (direct or circumstantial) is relevant and the inferences are fair, if the first inference is a reasonably probable one, there should be no prohibition against using it as a basis for a succeeding inference.[13]

[13] See Vaccarezza v Sanguinetti, 71 Cal App 2d 687, 698; 163 P2d 470 (1945).

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Janice A. Kabodian, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the Court of Appeals' decision and reinstate Defendant's convictions, and overrule the no inference upon inference rule of People v Atley, 392 Mich 298 (1974).

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
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